

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 607 OF 2006.

Maratha Sahayyak Mandal. ... Appellant.
Versus.
Brihanmumbai Mahanagarpalika & anr. ... Respondents.

Shri C.J.Sawant, Senior Counsel i/by Shri V.C.Ghosalkar
for the Appellant.
Shri J.Xavier for the Respondent No.1.
Shri S.K.Mali for Respondent No.2.

CORAM : ABHAY S.OKA, J.

DATED : 10th April, 2006.

P.C.:

1. Admit. The learned Advocates appearing for the Respondents waive service. By consent taken up for final hearing.

2. One of the grievances of the Appellant is that the Respondent No.1-Corporation filed an affidavit of evidence of one Mahendra Nagindas Chauhan, the Sub-Engineer R-Central Ward and the said witness was not made available for cross-examination by the Advocate for the Plaintiff/Appellant. Shri Xavier appearing on behalf of Respondent No.1 states that at the relevant time the said witness was not available and now the said witness is very much available though he is placed under suspension. He stated that the witness will be in a position to appear before the trial Court on a date fixed by this Court and he will offer himself for cross-examination by the Advocate appearing for the

Appellant/Plaintiff. Shri Xavier appearing for the Respondent No.1 further submitted that Respondent No.1 may be permitted to examine one more officer if examination of such officer is found necessary after conclusion of cross-examination of the said witness Shri Chauhan. Shri Mali appearing for the Respondent No.2 submitted that if the suit is to be sent back to enable the Advocate for the appellant to cross-examine the witness, a time bound programme deserves to be fixed. Shri Sawant appearing for the appellant submitted that now Respondent No.1 cannot be permitted to lead further evidence. He submitted that if further evidence is allowed to be led, then the other parties must also get an opportunity to lead further evidence.

3. It is a matter of fact that an opportunity was not available to the Appellant to cross-examine the said witness Mahendra Nagindas Chauhan. The Affidavit of evidence of the said witness is taken on record and has been relied upon by the Respondent No.1 before the trial Court. If the Respondent No.1 wants to rely upon the said evidence, surely opportunity must be made available to the Appellant-Plaintiff to test the said witness by cross-examination. Unless opportunity is available to cross-examine the said witness, his evidence will have to be ignored. As opportunity is to be granted to the Appellant to cross-examine the said witness, only on this ground, the decree passed by the trial Court

deserves to be set aside and the suit deserves to be remanded back to the trial Court.

4. In the event, the learned trial Judge considers the request of Respondent No.1 and grants permission to the Respondent No.1 to lead further evidence, he will also give an opportunity to the other parties to lead further evidence.

5. Hence the following order is passed:

i) The impugned Judgment and decree dated 1st February 2006 is quashed and set aside and L.C.Suit No.3995 of 2002 is restored to file.

ii) The parties are directed to appear before the trial Court on 7th June 2006. On that day, the Respondent No.1 will procure presence of the said witness Mahendra Nagindas Chauhan for the purpose of cross examination by the Advocate appearing for the Appellant.

iii) If the Respondent No.1 desires to lead any further evidence, the Respondent No.1 will be free to apply to that effect before the trial Court. If the learned trial Judge

permits Respondent No.1 to lead further evidence, he will also give an opportunity to the other parties to lead further evidence.

- iv) The trial Court will decide the matter afresh after considering the evidence which is already on record and the evidence which will be adduced after remand. The trial Court will decide the suit as expeditiously as possible and preferably on or before 20th October 2006.
- v) All contentions of the parties are kept open. It is made clear that the order of remand is passed only on the ground that the opportunity was not available to the Appellant to cross-examine the witness examined by Respondent No.1.
- vi) The interim relief which was operating during the pendency of the suit will operate till final disposal of the suit.
- vii) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.